

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
March 28, 2007 Session

**STATE OF TENNESSEE v. KEVON FLY**

**Appeal from the Criminal Court for Greene County**  
**No. 06CR018 James Edward Beckner, Judge**

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**No. E2006-01979-CCA-R3-CD - Filed July 26, 2007**

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The defendant, Kevon Fly, pleaded guilty to possession of cocaine, a Schedule II controlled substance with intent to sell or deliver and while employing a deadly weapon, *see* T.C.A. § 39-17-417(a)(4), (c)(2) (2003), and to unlawful possession of a weapon, *see id.* § 39-17-1307(c)(1). Via certified questions of law that test the constitutionality of a police traffic stop, *see* Tenn. R. Crim. P. 37(b)(2)(i), the defendant appeals the trial court's denial of a motion to suppress the contraband obtained from the traffic stop and resulting search. The questions of law are properly reserved for appellate review, and because an unlawful detention in the form of a "dog sniff" led to unconstitutional searches and seizures, we reverse the trial court's order. The search-and-seizure issue is dispositive of the case; thus, we vacate the judgments of conviction and order the dismissal of the charges against the defendant.

**Tenn. R. App. P. 3; Judgments of the Criminal Court are Reversed and Dismissed.**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. McLIN, JJ., joined.

Richard L. Holcomb, Knoxville, Tennessee, for the Appellant, Kevon Fly.

Robert E. Cooper, Jr., Attorney General & Reporter; Leslie E. Price, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Amber Depriest, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

At approximately 1:00 a.m. on October 27, 2005, Greeneville City Police Officer Kenni Carter was patrolling West Main Street when he saw a blue Ford parked in the parking lot at Ace Hardware, a location where large pieces of inventory are left outside at night and can be "easily

stolen.”<sup>1</sup> As Officer Carter drove past Ace Hardware, the blue Ford emerged from the parking lot onto West Main Street. Following the blue Ford, Officer Carter noticed that it “crossed the center line on several occasions.” The officer stopped the Ford “[f]or crossing the centerline, driving left of center,” approached the driver, and asked for “license, registration and proof of insurance.”

The defendant, who was driving the Ford and alone in the car, was able to produce only a registration document. The officer asked the defendant “where he was going, where he was coming from, and why he was on the lot of Ace Hardware” and testified that the defendant replied that he was “just out driving around.” The officer gleaned that the defendant was from Humboldt, Tennessee, and was a Tusculum College student. Officer Carter found it “suspicious” that a student from the college would pass commercial establishments that were open at 1:00 a.m. to come to West Main Street where the businesses were closed at that hour.

After Officer Carter wrote the defendant citations for failure to possess proof of insurance and a driver’s license, he asked the defendant for permission to search his vehicle. The defendant denied the permission. The officer asked the defendant to step out of his car and informed him that the officer’s dog, Rico, was with him and that he intended to “run Rico around the vehicle real quickly, and . . . as long as Rico didn’t [react], he would be on his way in just a matter of minutes.” The defendant, who then appeared “nervous,” asked, “Why. . . do you need to do this?” After the defendant emerged from his car at the officer’s request, the officer noticed that the defendant, who was wearing loose-fitting gray sweat pants and a gray hooded jacket, “was putting his hands in his pockets quite a bit.”

The officer asked the defendant to step “to the side” while he retrieved Rico from the police car. The dog, which was trained to detect drugs, reacted to the driver’s door handle. The officer testified that the dog’s positive reaction to drugs consisted of “scratches and barks.”<sup>2</sup> When Officer Carter asked the defendant if he knew why the dog had reacted to the vehicle, the defendant said, “No.” Officer Carter then allowed Rico to enter the Ford’s interior, where Rico then reacted to the steering wheel.

At this point, the defendant’s “hands [were] making movements inside his clothing and stuff.” The officer returned the dog to the patrol car and then “pat[ted] down [the defendant’s] outer clothes for weapons.” During the pat-down, Officer Carter “felt a distinct plastic bag” inside the defendant’s pants on his right thigh. The officer asked the defendant about the object, and the defendant responded that it was his shorts. Discounting this explanation as unreasonable, Officer

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<sup>1</sup>We are informed of the facts underlying the motion to suppress and ultimately the convictions in this case through the transcript of the defendant’s general sessions court preliminary hearing. In the criminal court suppression hearing, the parties and the court relied upon the preliminary hearing transcript, and the court exhibited this transcript to the suppression-hearing record.

<sup>2</sup> In lieu of the verb “alert” that is often used to describe the olfactory stimulation of a drug-sniffing dog, we use the intransitive verb “react.” “Alert” is a transitive verb that, conventionally, takes an object or else must be used in the passive voice.

Carter then handcuffed the defendant and continued frisking him. When he felt the right thigh area again, the plastic bag was gone. When the officer “frisked down [the defendant’s] leg [and] got to his ankle, a baggy fell out containing nine smaller baggies of a white substance.” The defendant spontaneously stated that the bags did not belong to him and had been left in his car by someone else.

Officer Carter then called for another police officer, and Officer Jeff Craft arrived. Officer Carter then searched the defendant’s Ford and found a pistol beneath the passenger seat.

Officer Carter testified that the white substance in the “baggies” was determined by field testing to be cocaine.

On cross-examination in the preliminary hearing, Officer Carter testified that he knew of no history of thefts at the Ace Hardware on West Main Street. The officer admitted that he had failed initially to use the video camera in his cruiser to document the first few instances of the Ford’s crossing the centerline of the street after it left Ace Hardware. Officer Carter stated that he did not charge the defendant with driving under the influence because he did not appear to be intoxicated when the officer confronted him, and the officer “was not in the practice of every charge that a driver makes of citing them [sic] and running their fine up.”

Officer Carter testified that he harbored suspicions about the defendant’s proximity to the outdoor inventory at Ace Hardware yet, he admitted that the dog Rico was not trained to “sniff burglary tools, stolen items or anything of that nature.” Officer Carter testified that he opted to frisk the defendant because of his inserting his hands into his baggy clothing, not because the dog had reacted to the driver’s side of the Ford.

Officer Carter admitted on cross-examination in the preliminary hearing that, in his career, he had known persons to react nervously when police officers sought permission to search their vehicles, even though the vehicles contained no evidence of wrongdoing.

The criminal court reviewed the preliminary hearing transcript and denied the motion to suppress.<sup>3</sup>

The defendant appeals both convictions pursuant to the certified-question provisions of Tennessee Rule of Criminal Procedure 37(b). He states the certified questions as follows:

1. [Whether] the traffic stop of [the defendant] was supported by reasonable suspicion . . . as required by the Fourth Amendment of the United States Constitution and Article 1 [section] 7 of the Tennessee Constitution.

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<sup>3</sup> A criminal court transcript reflects the trial judge’s decision to deny the motion to suppress, although the appellate record contains no entry of an order denying the suppression motion.

2. Whether the scope of the detention following the traffic stop was exceeded by Officer Kenni Carter, without reasonable suspicion or probable cause, in violation of [the same constitutional provisions].
3. Whether Officer Carter had sufficient reasonable suspicion that [the defendant] was armed in order to justify a *Terry* pat-down . . . .
4. Whether Officer Carter exceeded the scope of a *Terry* pat-down . . . .<sup>4</sup>

The record demonstrates that the defendant properly reserved his certified questions pursuant to Rule 37(b), and we turn to a review of the substantive issues presented.

### *I. General Principles, Burden of Proof, and Standard of Review*

Both the United States and Tennessee Constitutions protect against unreasonable searches and seizures. U.S. Const. amend IV; Tenn. Const. art. 1, § 7. The intent and purpose of the prohibitions against unreasonable searches and seizures found in the Tennessee Constitution correspond to the provisions found in the Fourth Amendment to the United States Constitution. *See State v. Simpson*, 968 S.W.2d 776, 779 (Tenn. 1998).

A search or seizure conducted without a warrant is presumed unreasonable, thereby requiring the State to prove by a preponderance of the evidence that the search or seizure was conducted pursuant to an exception to the warrant requirement. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043 (1973); *State v. Simpson*, 968 S.W.2d 776, 780 (Tenn. 1998). Thus, a trial court necessarily indulges the presumption that a warrantless search or seizure is unreasonable, and the burden is on the State to demonstrate that one of the exceptions to the warrant requirement applied at the time of the search or seizure.

Because stopping an automobile without a warrant and detaining its occupants unquestionably constitutes a seizure, the State in the present situation carried the burden of demonstrating the applicability of an exception to the warrant requirement. *See, e.g., State v. Cox*, 171 S.W.3d 174, 179 (Tenn. 2005) (temporary detention of an individual during a traffic stop constitutes seizure that implicates the protection of both the state and federal constitutions); *State v. Keith*, 978 S.W.2d 861, 865 (Tenn. 1998).

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<sup>4</sup> In his brief, the defendant aligns these four issues, respectively, with “[f]irst, the traffic stop[; s]econd, the ordering of [the defendant] out of his vehicle after the traffic citation was issued[; t]hird, the *Terry* frisk[; and f]ourth, the arrest of [the defendant] after Officer Carter felt a plastic bag.” We will address the issues raised by the defendant; however, we undertake a different approach or method from that urged by the defendant.

When a party appeals the trial court's ruling on a suppression motion, the standard of appellate review requires acceptance of the trial court's findings regarding "questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence," unless the evidence preponderates against the findings. *State v. Ross*, 49 S.W.3d 833, 839 (Tenn. 2001); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996); *State v. Cothran*, 115 S.W.3d 513, 519 (Tenn. Crim. App. 2003). However, "when a trial court's findings of fact on a motion to suppress are based solely on evidence that does not involve issues of credibility, appellate courts are just as capable to review the evidence and draw their own conclusions." *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000). In that situation, "a reviewing court must examine the record de novo without a presumption of correctness." *Id.* Moreover, the application of the law to the facts found by the trial court is a question of law that is reviewed de novo. *State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000); *Odom*, 928 S.W.2d at 23.

## *II. Reasonableness of the Initial Seizure of the Defendant and His Vehicle*

In the present case, the defendant was initially stopped – seized, for constitutional purposes – as an investigatory measure. Therefore, the first issue presented is whether this warrantless seizure, which precipitated subsequent searches, was constitutionally unreasonable. Although a warrant is normally required when a police officer intrudes upon the privacy of a citizen, narrowly defined exceptions to this warrant requirement are recognized. An exception pertinent in the present case is the brief investigatory stop; though warrantless, such a stop is reasonable when the detaining officer has a reasonable suspicion supported by specific and articulable facts that a criminal offense has been – or is about to be – committed. *Terry v. Ohio*, 392 U.S. 1, 20-23, 88 S. Ct. 1868, 1880-81 (1968).

Whether reasonable suspicion existed in a particular case is a fact-intensive, but objective analysis. *State v. Garcia*, 123 S.W.3d 335, 344 (Tenn. 2003). The likelihood of criminal activity required for reasonable suspicion is not as great as that required for probable cause and is "considerably less" than would be needed to satisfy a preponderance of the evidence standard. *United States v. Soklow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989). Furthermore, a court must consider the totality of the circumstances in evaluating whether a police officer's reasonable suspicion is supported by specific and articulable facts. *State v. Hord*, 106 S.W.3d 68, 71 (Tenn. Crim. App. 2002). The totality of the circumstances embraces considerations of the public interest served by the seizure, the nature and scope of the intrusion, and the objective facts on which the law enforcement officer relied in light of his experience. See *State v. Pulley*, 863 S.W.2d 29, 30-31 (Tenn. 1993). The objective facts on which an officer relies may include his or her own observations, information obtained from other officers or agencies, offenders' patterns of operation, and information from informants. *State v. Michael James Grubb*, No. E2005-01555-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Knoxville, Apr. 18, 2006).

In the present case, we are bound by the facts as presented to the criminal court. At the defendant's bidding, the trial court relied upon a transcript of Officer Carter's testimony in the

general sessions court preliminary hearing as the factual basis for its application of law, and hence, the trial court relied upon the preliminary hearing transcript without receiving any live testimony. As such, it had no basis upon which to refute the officer's uncontradicted testimony. *See Binette*, 33 S.W.3d at 217 (commenting that the use of a "deposition" is evidence that does not involve "issues of credibility"). Furthermore, the general sessions court had viewed the officer's cruiser's videotape, but the tape was apparently not exhibited to the general sessions court preliminary hearing and was not reviewed by the criminal court in the suppression hearing. In any event, the videotape is not contained within the appellate record before this court. In this situation, we believe the defendant is in no position to claim that the evidence before the criminal court was beset with issues of Officer Carter's credibility or that the videotape contraindicates the overruling of the suppression motion. *See State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991) (indicating that, in the absence of an adequate record on appeal, this court must presume that the trial court's rulings were properly supported).

Officer Carter followed the defendant's car because he saw it in the wee hours of the morning parked near Ace Hardware merchandise. After the car left the Ace Hardware parking lot and the officer saw it cross the centerline of the street on more than one occasion, the officer suspected the defendant of driving under the influence and stopped the defendant to investigate.<sup>5</sup> In this situation, we conclude that Officer Carter entertained a reasonable suspicion based upon his own observation that the driver of the blue Ford was committing an offense. In so concluding, we recognize that an officer's subjective intention for stopping a vehicle is irrelevant when independent grounds exist for the detention. *See Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774 (1996); *State v. Vineyard*, 958 S.W.2d 730, 734 (Tenn. 1997). Thus, we hold that the initial stop of the Ford was reasonable under the totality of the circumstances. After stopping the vehicle, Officer Carter was then in a position to conduct a brief investigation.

### *III. Scope of the Initial Investigative Inquiry*

Upon initially approaching the defendant in his blue Ford, the officer asked for the defendant's driver's license, vehicle registration, and proof of insurance, and the officer asked the defendant where he had been and where he was going.

A *Terry*, post-detention investigation must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20, 88 S. Ct. at 1879. The detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325 (1983). "[T]he proper inquiry is whether during the detention, the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *State v. Simpson*, 968 S.W.2d 776, 783

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<sup>5</sup> We acknowledge that, after viewing the videotape from the officer's cruiser, the general sessions judge was not convinced that the defendant's driving as depicted on tape would have alone supported a traffic stop. We note, however, that Officer Carter testified in the preliminary hearing that at least one of the defendant's crossings of the centerline occurred before the officer activated his video camera and that he was unsure how many of the crossings were recorded on the videotape.

(Tenn. 1998). If “the time, manner or scope of the investigation exceeds” the ambit of reasonableness, a constitutionally permissible stop may be transformed into one which violates the Fourth Amendment and article 1, section 7 of the Tennessee Constitution. *United States v. Childs*, 256 F.3d 559, 564 (7th Cir. 2001); *see also State v. Morelock*, 851 S.W.2d 838, 840 (Tenn. Crim. App. 1992).

In reviewing a vehicle-stop *Terry* investigation, this court has said that “requests for driver’s licenses and vehicle registration documents, inquiries concerning travel plans and vehicle ownership, computer checks, and the issuance of citations are investigative methods or activities consistent with the lawful scope of any traffic stop.” *State v. Gonzalo Garcia*, No. M2000-01760-CCA-R3-CD, slip op. at 22 (Tenn. Crim. App., Nashville, Feb. 20, 2002) (citing *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000); *United States v. Hill*, 195 F.3d 258, 268 (6th Cir. 1999); *United States v. Lyton*, 161 F.3d 1168, 1170 (8th Cir. 1998), *overruled on other grounds by State v. Garcia*, 123 S.W.3d 335 (Tenn. 2003)). Thus, in the present case, the officer’s questions – with the possible exception of a request for proof of insurance – were reasonable and within the scope of the limited ambit of investigation entrusted to the officer in the situation.

Next, these reasonable questions and the officer’s records check elicited information that, although the defendant had actually been issued a valid driver’s license, he did not have a license with him at the time of the stop. The officer’s questioning also informed him that the defendant was in Greeneville as a student at Tusculum College. At any rate, in relatively short order, the officer reasonably issued citations for the document-related traffic offenses. We see nothing improper about the scope or duration of the detention through the point in time when the officer issued the citations.

#### *IV. The Reasonableness of the Resulting Searches*

The officer, after writing the citations, requested consent to search the vehicle.<sup>6</sup> After consent to search was denied, Officer Carter ultimately (1) detained the defendant until his dog sniffed for narcotics around the exterior of, and eventually inside, the defendant’s vehicle, (2) frisked the defendant and seized plastic bags containing cocaine, and (3) searched the defendant’s vehicle and seized a pistol. Having discerned no official miscues antecedent to these three distinct activities, we now turn to them in seriatim.

##### *A. The Use of the Drug-Sniffing Dog*

Initially, we acknowledge that the dog sniff of the Ford did not directly lead to the discovery of drugs; no drugs were ever found inside the Ford. Nevertheless, the dog sniff

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<sup>6</sup> Generally, it is of no constitutional concern that an officer, who is exerting no coercion and is in a public place, merely asks a citizen for consent to search. *United States v. Drayton*, 536 U.S. 194, 201, 122 S. Ct. 2105, 2110 (2002). In the present case, the defendant withheld consent for a search of his car. Thus, the request for consent is of no further consequence to our analysis, except to the extent to which the defendant’s reaction to the consent request may impinge upon the validity of the officer’s ensuing searches and seizures.

necessitated a prolonged encounter between the officer and the defendant, following which the frisk and car search occurred. Thus, the issue of the validity of the dog sniff imports constitutional concerns.

The “sniff” of a narcotics-seeking dog is *sui generis* and does not implicate any legitimate privacy interest; consequently, a dog’s sniff does not per se constitute a search under the Fourth Amendment and requires neither probable cause nor reasonable suspicion. *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2645 (1983); *State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000). The United States Supreme Court has said that a dog sniff performed on the exterior of a defendant’s car “while he was lawfully seized for a traffic violation” did not rise to the level of a constitutionally cognizable infringement. *Illinois v. Caballes*, 543 U.S. 405, 409, 125 S. Ct. 834, 838 (2005).

Regarding the sniffing by a dog, then, the constitutional issue focuses not upon the means used to detect the presence of narcotics but rather the time it takes to conduct the dog’s sniff of the vehicle. An otherwise lawful canine sweep that is ancillary to a legitimate traffic stop may constitute an unlawful search if the suspect is detained beyond the time necessary to complete the traffic stop. *See United States v. Jacobsen*, 466 U.S. 109, 124, 104 S. Ct. 1652, 1662 (1984) (indicating that seizure that is lawful at its inception can violate Fourth Amendment if its manner of execution unreasonably infringes interests protected by constitution); *Troxell*, 78 S.W.3d at 871 (indicating that reasonable traffic stop can become unreasonable and constitutionally invalid if time, manner, or scope of investigation exceeds the proper parameters); *see also Royer*, 460 U.S. at 500, 103 S. Ct. at 1325-26; *State v. Justin Paul Bruce*, No. E2004-02325-CCA-R3-CD, slip op. at 7 (Tenn. Crim. App., Knoxville, Aug. 22, 2005).

Interlocking with these rules of constitutional force, Tennessee Code Annotated sections 40-7-118 and 55-10-207(f) provide that when an officer observes the commission of certain misdemeanors, such as a violation of the driver’s-license and proof-of-insurance laws in the present case, the officer is required to cite and release the misdemeanant in lieu of effecting a custodial arrest. T.C.A. §§ 40-7-118(b)(1) (2003), 55-10-207(f) (Supp. 2003). “Accordingly, the Tennessee ‘cite and release’ statute creates a presumptive right to be cited and released for the commission of a misdemeanor.” *State v. Walker*, 12 S.W.3d 460, 464 (Tenn. 2000). A custodial arrest in violation of the “cite and release” statute constitutes a violation of the right against an unreasonable search and seizure. *See id.* at 467.

Therefore, in sum and “[s]imply put, a law enforcement officer making a valid traffic stop must not prolong the stop for longer than necessary to process the traffic violation *without having some reasonable suspicion of other criminal activity sufficient to warrant prolonging the stop.*” *Id.* (emphasis added). Thus, we arrive at this crossroad – either (1) the canine sweep of the defendant’s vehicle must be properly accommodated *within* the duration and scope of the legal traffic stop or, if not, (2) it must be independently justified by the facts.

- (1) Accommodation by the duration and scope of the traffic stop

First, we determine whether any independent factual justification for the canine sweep was even constitutionally necessary. The inquiry is whether the use of the drug-sniffing dog was conducted within the reasonable scope and duration of the detention. *See generally Caballes*.

Officer Carter testified that “[a]fter [he] wrote [the defendant] the citation,” he “asked for consent to search the vehicle.” Consent was denied. The officer then “asked [the defendant] to step out of the vehicle” and told him that he was going to “run [his dog] around the vehicle real quickly.” The officer noticed at this time that the defendant, who had emerged from the car as requested, was moving his hands around in his pockets.

Our review of caselaw involving the use of a drug-sniffing dog on a stopped vehicle yields a rather simple rule: The officer needs no suspicion or cause to “run the dog around” the stopped vehicle if he does it contemporaneously with the legitimate activities associated with the traffic violation. *See Caballes*, 543 U.S. at 409, 125 S. Ct. at 837-38 (upholding constitutionality of dog sniff conducted by an officer “[w]hile [a second officer] was in the process of writing a warning ticket, [the second officer] walked his dog around [Caballes’] car” and stating that the use of the dog during Caballes’ traffic stop “[did] not implicate legitimate privacy interests” because “the dog sniff was performed on the exterior of [Caballes’] car *while* he was lawfully seized for a traffic violation”) (emphasis added); *England*, 19 S.W.3d at 767-68 (upholding constitutionality of a dog sniff *while* the officer waited for a reply to a records check following a stop for a license-plate-lighting violation, stating that “the canine sweep did not constitute a search under the Fourth Amendment and therefore required neither probable cause nor reasonable suspicion”). If the officer conducts the dog sniff after these activities are – or should have been – completed, *see generally Justin Earl Bruce*, he is engaging the motorist in an unconstitutional detention, unless an independent basis for suspicion has legitimately evolved. *State v. Morelock*, 851 S.W.2d 838, 840 (Tenn. Crim. App. 1992) (holding that a constitutional violation occurred when the officer issued the motorist a citation, was denied permission to search the trunk of the motorist’s vehicle, sent for a drug sniffing dog, and used the dog to detect drugs in the trunk).<sup>7</sup>

Because Officer Carter had already issued the citations to the defendant, the time frame for “running the dog around” the vehicle without any suspicion or cause had expired. We turn now to the issue whether a suspicion independent of the reason for the stop justified the use of the dog.

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<sup>7</sup> The officer stopped Morelock because his license plate was not properly illuminated. A records check had revealed that Morelock had been issued a valid driver’s license, but Morelock did not have the license in his possession at the time of the stop, resulting in a citation. This court in *Morelock* commented that if the officer had chosen “not to allow Morelock to resume his journey without a driver’s license in his immediate possession, which would itself have been a violation, he could have directed Morelock to lock the car and leave it parked until another person could legally drive it away.” The court said that, alternatively, had the officer “concluded that the car constituted a traffic hazard, he could have ordered the car towed.” “So what we have here,” the court concluded, “is a routine traffic stop prolonged and extended to the point that the detention, reasonable in the beginning, became unreasonable toward the end.” *Morelock*, 851 S.W.2d at 840.

(2) Independent factual basis justifying a canine sweep

In the present case, we discern no facts from the officer's initial observations of an encounter with the defendant that suggest a reasonable suspicion that a drug crime was being committed. *Cf. United States v. French*, 974 F.2d 687, 690 (6th Cir. 1992) (explaining that, after truck was stopped for weaving, officers smelled odor of marijuana emanating from rear of truck and then had reasonable suspicion to investigate, reasonably waiting on a narcotics-detection dog that was 50 miles away at the time of the call), *overruled in part on other grounds by United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993). Rico, Officer Carter's dog, was trained to detect the presence of drugs, not items such as bolt-cutters or stolen lawn mowers. Moreover, the officer's initial concerns about the defendant's being intoxicated apparently were quickly dispelled following the officer's face-to-face encounter with the defendant.

Furthermore, no facts developed after the officer's approach of the defendant's vehicle that independently supported conducting a canine sweep of the vehicle. We know that Officer Carter testified that the defendant, who was still seated in his car, became "nervous" when the officer asked him for consent to search the vehicle; however, we reject this observation as a sole, independent basis for conducting the dog's sweep. First, we note that Officer Carter admitted that, in his experience, people who were committing no offenses could become nervous when asked by a police officer for consent to search. We have no doubt that such is true. Second, this court has opined that a *Terry*-type frisk may not be merely based upon the "standardless" perception that the detained motorist was "nervous." *State v. Eric Berrios*, No. W2005-01179-CCA-R9-CD, slip op. at 13 (Tenn. Crim. App., Jackson, Mar. 3, 2006), *perm. app. granted* (Tenn. 2006).

Consequently, we fail to discern any justification for delaying the detention for the purposes of using the drug dog, even if it was done "real quickly." When the officer gave the defendant the citations, the legitimacy of the detention ended.

*B. The Frisk*

Officer Carter testified that Rico's positive reaction to the defendant's car did not prompt the frisk of the defendant that followed the dog's sweep; rather, when he saw the defendant fidgeting in his pockets, he became concerned that the defendant might have a weapon. For this reason, he testified, he "patted down" the defendant and felt the plastic bag in the defendant's pants.

The authority to frisk remains circumscribed by the dictates of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), in which the Supreme Court approved the limited and temporary seizure of a person for questioning and for a "pat-down" for weapons if an officer has a reasonable suspicion that the person is armed and dangerous. *Id.* at 26-28, 88 S. Ct. at 1882-83. *Terry* did not approve a "pat-down" for weapons as standard procedure. *See State v. Fred Arthur Stier*, No. W1999-00600-CCA-R3-CD, slip op. at 7 (Tenn. Crim. App., Jackson, Apr. 7, 2000); *see also Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 3150 (1984) ("[T]he usual traffic stop is more analogous to a so-called '*Terry* stop' . . . than to a formal arrest.").

In the present case, we need not determine whether the defendant's hand movements reasonably engendered a suspicion that he was armed and dangerous. At the time the officer observed the hand movements, the defendant was being illegally detained. Moreover, as we have shown, the officer did not legitimately acquire the drug-possession information provided by Rico. We hold that because the frisk occurred during the unlawful detention and was unsupported by legally obtained information, the frisk was unlawful. It follows that the cocaine discovered on the defendant's person as a result of the frisk was inadmissible. We need not parse the nuances surrounding the timing of handcuffing the defendant.

### *C. The Search of the Defendant's Car*

The post-frisk arrest of the defendant led sequentially to Officer Carter's search of the Ford, which resulted in his discovery of the pistol.

We have no doubt that, had the defendant been lawfully arrested, the officer would have been authorized to search, incidentally to the arrest, the passenger compartment of the car. One exception to the warrant requirement is a contemporaneous police search that follows a lawful arrest, *Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 2040 (1969); *State v. Crutcher*, 989 S.W.2d 295, 300 (Tenn. 1999), and when "the arrestee is an occupant of a vehicle, police officers may conduct searches, contemporaneous to the arrest, of the passenger compartments inside the vehicle," *Crutcher*, 989 S.W.2d at 300 (citing *New York v. Belton*, 453 U.S. 454, 457, 101 S. Ct. 2860, 2862 (1981)).

As we have already determined in the present case, however, Officer Carter had no lawful basis for arresting the defendant, and no other exception to the warrant requirement legitimates the search of the car. Consequently, the pistol retrieved from the car was inadmissible.

### *V. Conclusion*

Based upon the foregoing analyses, neither the cocaine nor the pistol were admissible into evidence, and the trial court erred in denying the defendant's suppression motion. Accordingly, the order of the trial court is reversed, the judgments of conviction are vacated, and because the issue presented to this court is dispositive of the case, the charges against the defendant shall be dismissed.

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JAMES CURWOOD WITT, JR., JUDGE